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NEW FMLA REGULATIONS TAKE EFFECT JANUARY 16, 2009

The U. S. Department of Labor (“DOL”) published its final revised regulations on November 17, 2008, interpreting the Family and Medical Leave Act (“FMLA”). The DOL’s new regulations, in excess of 750 pages, become effective on January 16, 2009. This summary highlights some of the more significant provisions of the new regulations of particular note to employers.*

Serious Health Condition

The new DOL regulations clarify the definition of “serious health condition” by providing guidance on what constitutes qualifying treatment. 29 C.F.R. § 825.115(a). The regulations continue to maintain that health conditions such as a cold or the flu do not satisfy the definition of “serious health condition” – unless they independently meet the existing criteria for a serious health condition, i.e., an incapacity of more than three (3) consecutive days that also involves qualifying treatment. *Id.*

Intermittent Leave

Under the new regulations, employees who take intermittent FMLA leave for planned medical treatments must make a “reasonable effort” to schedule the treatment and resulting leave so as not to unduly disrupt the employer’s operations. The rules suggest that employees must try to arrange treatment on a schedule that accommodates the employer’s needs. 29 C.F.R. § 825.203.

Fitness-for-Duty Evaluations

The new regulations allow employers to require workers taking intermittent FMLA leave and returning to jobs that could endanger themselves or others to submit to “fitness-for-duty” evaluations before returning to work. 29 C.F.R. § 825.312. Employers may also require that the evaluation specifically address the employee’s ability to perform the essential functions of the employee’s job, provided the employer has previously identified the essential functions in the notice provided to the employee designating the absence as FMLA leave. *Id.* at 825.312(b).

Waiver of FMLA Claims

Under the DOL’s new regulations, voluntary settlements and releases of past FMLA violations are enforceable and do not have to be approved by the DOL or a court. 29 C.F.R. § 825.220(d). This regulation rejects the Fourth Circuit’s contrary finding in *Taylor v. Progress Energy*, 493 F.3d 454 (4th Cir. 2007), which held that employees cannot voluntarily settle their FMLA claims without court or DOL approval. Prospective waivers of future FMLA rights violations continue to be prohibited under the new regulations.

* The FMLA is the federal statute enacted in 1993 that allows eligible employees up to 12 weeks of unpaid leave within a 12-month period to care for a sick family member or a new baby or when the employee develops a serious health condition. To be eligible under the FMLA, employees must have worked at least 12 months and have worked at least 1250 hours during that time at a worksite at which the employer has at least 50 employees within 75 miles of the worksite.

Perfect Attendance Awards

Employers may now consider FMLA absences in determining bonuses and other incentive rewards. The new regulations permit employers to disqualify employees from bonuses or awards based on a job-related performance goal (such as perfect attendance or products sold) where the employee has not met the goal due to FMLA leave, so long as the employer treats employees taking non-FMLA leave in the same manner. 29 C.F.R. § 825.215.

Employee Notice Requirements

Previously, employees were permitted to provide notice to an employer of the need for FMLA leave up to two (2) full business days *after* an absence, even if they could have provided notice more quickly. The final DOL regulations now provide that employees needing FMLA leave must follow the employer's usual and customary call-in procedures for reporting an absence from work, absent unusual circumstances (such as when the employee or employee's family member needs emergency medical treatment). If the employee calls in sick without providing more information, such notice will not be considered sufficient to trigger FMLA protections. The employer, however, is expected to request additional information to determine whether the leave sought qualifies under the FMLA. The employee must respond to the employer's inquiries and risks denial of the FMLA protection for failure to do so. 29 C.F.R. § 825.303.

Medical Certifications

Employers now have five (5) business days (instead of the previous two (2) business days) to request medical certification from the employee after the employee requests leave, or in the case of unforeseen leave, the date the employee commences leave. An employee has 15 calendar days to submit a medical certification for both foreseeable and unforeseeable leave. Under the new regulations, employers must notify employees in writing if additional information is necessary to complete the medical certification and allow employees seven (7) calendar days to provide the additional information. If deficiencies are not cured, an employer may deny FMLA leave. Finally, the regulations permit employers to require new medical certification every new leave year where a serious health condition extends beyond a single leave year, as well as medical recertification every six (6) months for continuing, open-ended conditions. 29 C.F.R. §§ 825.305, 825.306, 825.307.

Communication with Healthcare Provider

The new regulations now permit an employer's human resource professional or management official to directly contact an employee's healthcare provider to clarify or authenticate a medical certification provided by the employee. 29 C.F.R. § 825.307(a). However, the employee's direct supervisor may not make such contact, and the employer may not request additional information from the provider beyond that which is included in the certification form. Id.

Interaction with ADA

The DOL's regulations recognize that an employee's serious health condition may also be a disability under the ADA or trigger workers' compensation benefits. Employers may now follow procedures for requesting medical information under the ADA or workers' compensation programs without violating the FMLA. Employers may also consider any information received pursuant to such procedures or benefit programs in determining an employee's entitlement to FMLA leave. 29 C.F.R. § 825.306(d).

Employer Notice Requirements

In an effort to clarify employers' notice requirements, the new regulations state that employers must provide all employees (even employees not eligible under the FMLA) with a general notice about the FMLA upon hiring, including a poster and an employee handbook or written notice. When specific leave issues arise, the DOL's new regulations also require employers to provide: (i) an eligibility notice informing employees of their eligibility to take FMLA leave; (ii) a rights and responsibilities notice explaining the expectations and obligations of employees under the FMLA; and (iii) a designation notice informing employees as to whether their leave will be treated as FMLA leave. The eligibility and rights/responsibilities notices must be given to employees within five (5) business days of an employee's request for leave. The designation notice must be provided within five (5) business days from the time an employer has gathered sufficient information to determine whether the absence qualifies as FMLA leave. 29 C.F.R. § 825.300.

Substitution of Paid Leave

Under the DOL's final regulations, an employer must inform the employee of any additional internal requirements associated with the employer's paid leave policy when providing notice of FMLA eligibility to an employee. If an employee chooses to substitute paid leave for FMLA leave, the terms and conditions of an employer's paid leave policy apply and must be followed. 29 C.F.R. § 825.207.

Employer's Failure to Provide Notice

The DOL regulations now reflect the current law after Ragsdale v. Wolverine World Wide, Inc., 535 U. S. 81 (2002), where the U. S. Supreme Court held that, despite an employer's failure to properly designate an absence as FMLA leave, no FMLA violation occurred where the employer nonetheless provided the employee with 30 weeks of leave. The DOL's final rule now permits retroactive designation and notice by an employer that a leave is covered by the FMLA, if the employer's delay does not cause the employee harm or injury. 29 C.F.R. § 825.301. If such harm is shown, the untimely designation may be voided and damages in the form of compensation and benefits may be available.

Increased Liability for Failure to Provide Notice

The final regulations clarify that an employer's failure to provide timely and written notice that an employee's absence is designated as FMLA leave may constitute "interference" with an employee's FMLA rights. The DOL regulations increase the damages available for such interference to include compensation and benefits lost due to the violation and appropriate equitable and other relief, including employment, reinstatement, promotion or the broad category of "any other relief tailored to the harm suffered." 29 C.F.R. § 825.301.

Retaliation

The DOL specifically added a reference to retaliation in 29 C.F.R. § 825.220(c) to clarify that prohibition against interference with an employee's FMLA rights includes prohibition against retaliation (as well as discrimination) where employees assert their rights under the FMLA.

Light Duty

Under the new DOL regulations, where an employee returns from FMLA leave but is only capable of performing "light duty" assignments, employers are prohibited from designating time spent on "light duty" as FMLA leave. An employee voluntarily performing "light duty" is not on FMLA leave according to the new regulations. 29 C.F.R. § 825.220(d).

Military Leave

On January 28, 2008, President George W. Bush signed the National Defense Authorization Act (“NDAA”) into law, amending the FMLA to grant additional leave and protection to persons serving in the military and their families. The DOL’s final regulations clarify two (2) of the key provisions of the NDAA, and enable employers to better administer FMLA leave to persons in the military and their families.

– First, the NDAA amended the FMLA to permit up to 26 weeks of unpaid leave in a single 12-month period to a family member who cares for a member of the military with a serious illness or injury incurred in the line of duty or on active duty. For purposes of this leave, the DOL’s new regulations state that family members include spouses, children, parents, grandparents, aunts, uncles, first cousins and any relative designated by the injured service member. 29 C.F.R. § 825.127.

– Second, the NDAA amended the FMLA to permit family members of National Guard and Reserve personnel who are deployed or called to active duty up to 12 weeks of unpaid leave in a single 12-month period for any qualifying exigency arising from deployment or active duty. The DOL’s new regulations define qualifying exigencies as: (i) short-notice deployment; (ii) military events and related activities; (iii) financial and legal arrangements; (iv) childcare and school activities; (v) counseling; (vi) rest and recuperation; (vii) post-deployment activities; and (viii) additional activities not included in the other categories, but agreed upon by the employer and employee. 29 C.F.R. § 825.126.

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